IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 7187 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-

HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHILPRAJ DEVELOPERS PVT.LTD. - Petitioner(s)
Versus
V.S.GOPALACHAR AND/OR HIS SUCCESSOR IN OFFICE & 2 - Respondent(s)

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Appearance :
MR DHAVAL D VYAS for Petitioner No(s).: 1.
DS AFF.NOT FILED (N) for Respondent No(s).: 1,2.
MR JITENDRA MALKAN for Respondent No(s).: 1.
NOTICE SERVED BY DS for Respondent No(s).: 3.

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CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date : 22/07/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1 This petition raises various different challenges in relation to two different proceedings relatable to two different periods. However, after hearing the learned Senior Advocate appearing on behalf of the petitioner on 25/4/2005 the controversy was restricted to the Order-in-Original dated 28/9/2001 bearing No.SRT/ADJ/22/OA/2001-2002, more particularly coercive recovery proceedings as a consequence of the said order. It is the case of the petitioner that the aforesaid order had not been served on the petitioner at any point of time before initiating action of detention/attachment of goods. Upon issuance of notice the respondents have put in appearance and the pleadings are complete. Considering the fact that the controversy involves limited issue, the petition is taken up for final hearing and disposal today. Rule returnable today. Mr.Jitendra Malkan waives service on behalf of the respondents.

2 Responding to the petitioner's averment about non service of the Order-in-Original dated 28.9.2001, it is stated in the Affidavit-in-Reply that the said order had been sent by Registered Post on 8/3/2003 for which counter receipt from the Postal Authority is available

with the respondents and xerox copy has been attached with the Affidavit-in-Reply. Relying on Section 27 of the General Clauses Act,1897, it is submitted that the petitioner has been served through post.

3 Section 27 of the General Clauses Act states that where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression “serve” or either of the expression “give” or “send” or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. To put it differently , the Section stipulates that under any Central legislation if the requirement to serve a document by post is stipulated, once the document is addressed and the communication paid for and delivered with the post office after registration, it shall be sufficient compliance of the provision and a presumption will arise that the said document is served within the

ordinary time it would take for such postal article to be served.

4 However, the aforesaid presumption under Section 27 of the General Clauses Act is not available to the respondent authorities in light of Section 37C of the Central Excise Act,1944. The said provision under the Central Excise Act requires under clause (a) of sub-section (1) that any decision or order including notice/summons passed under the Act shall be served by tendering the decision, order, summons or notice, to the concerned person or sending it by registered post with acknowledgment due. Therefore, in light of this specific requirement of Section 37C(1)(a) of the Central Excise Act the exception carved out in Section 27 of the General Clauses Act by use of the phrase “unless different intention appears” comes into play. The respondent authority is required to establish that not only the decision/order was sent by Registered Post but it has further to show that the same is with Acknowledgment Due and the respondent authority is in possession of such Acknowledgment Receipt. The reason is not far to seek. An order/decision under the Act has not only fiscal but serious consequences. An assessee is

called upon to pay not only duty demanded under the Act, but is also visited with personal penalties levied on a director or a partner, etc., in a given case. Therefore, where an assessee is required to discharge liability fastened under the Act, there must be clear, cogent evidence to show that service is effected and the Department is in possession of acknowledgment of service.

5 In the present case, admittedly it is not even the case of the respondent authority that the order dated 28/9/2001 was dispatched by Registered Post Acknowledgment Due. Even if it was so dispatched, the respondent authority is admittedly not in possession of the Acknowledgment Receipt.

6 In fact, in the Affidavit-in-Rejoinder it is categorically stated in paragraph No.5 that after issuance of the notice by this Court the copy of order dated 28/9/2001 was received for the first time by the petitioner along with Affidavit-in-Reply. This position is not disputed. In the circumstances, grievance of the petitioner about non receipt of the order dated 28.9.2001 was justified and stands established.

7 The petitioner has stated in the Affidavit-in-Rejoinder that after the receipt of the Order-in-Original along with Affidavit-in-Reply an appeal has been filed before Commissioner, Central Excise (Appeals) Surat-II on 29/6/2005 along with application for stay and application for condonation of delay. At the time of hearing Mr.Dhaval Vyas, learned Advocate for the petitioner submitted that consequential proceedings for recovery of outstanding dues, including proceedings for attachment, in pursuance of the Order-in-Original dated 28.9.2001 be quashed and set aside in the facts and circumstances of the case. Alternatively, it was submitted that the petitioner may be protected till point of time the Commissioner (Appeals) takes up the application for stay for hearing and disposal.

8 In light of the fact that till the month of May,2005 (more particularly 13.5.2005) order dated 28/9/2001 was not served on the petitioner, as required in law, the respondent authorities cannot proceed with any steps for recovery of the demand raised by the said order. The respondent authorities are accordingly prohibited from proceeding with any steps for coercive recovery in

pursuance of the Order-in-Original dated 28/9/2001 till point of time the Commissioner (Appeals) hears and decides the application for stay already moved by the petitioner.

9 The petition is accordingly allowed in the aforesaid terms. Rule made absolute accordingly. There shall be no order as to costs. Direct service is permitted.

Sd/- Sd/-

(D.A.Mehta, J) (H.N.Devani,J)

m.m.bhatt